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No. 80-895

(Consolidated with Nos. 80-757 and 80-936)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

vs.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

BRIEF OF PETITIONER CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.

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QUESTION PRESENTED FOR REVIEW

Whether traders of commodity futures contracts may invoke the powers of the federal district courts in order to enforce Sections 4a, 4b and 9(b) of the Commodity Exchange Act, 7 U.S.C. §§6a, 6b and 13(b), against a futures commission merchant?

PARTIES BELOW

The parties to the three consolidated appeals below were:

No. 79-7402

Appellants: Neil Leist, Philip Smith and Incomco.

Appellees: Clayton Brokerage Co. of St. Louis, Inc.,* Heinold Commodities, Inc., Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc., New York Mercantile Exchange, Richard B. Levine, Howard Gabler, Alfred Pennisi.

No. 79-7464

Appellant: Incomco.

Appellee: The New York Mercantile Exchange.

No. 79-7482

Appellant: National Super Spuds, Inc.

Appellees: Heinold Commodities, Inc. and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc.

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* Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), the Petitioner herein, is a corporation. One hundred percent of the issued and outstanding stock of Clayton is owned by Garnac Grain Co., Inc. ("Garnac"). Clayton has no subsidiaries or affiliated corporations except corporations wholly owned by Clayton or Garnac and ADNAC, Inc., a corporation owned 50% by Garnac.

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OCTOBER TERM, 1980

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

VS.

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

BRIEF OF PETITIONER CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.

OPINIONS BELOW

The Opinion and Order of the District Court dismissing the claims of the Respondents herein against Petitioner and others insofar as the claims arose under provisions of the Commodity Exchange Act is published at 470 F.Supp. 1256 and is reprinted in the Joint Appendix (hereinafter "JA") at 60-77. The majority and dissenting Opinions of the Court of Appeals, reversing the judgment of the District Court, are reported at 638 F.2d 283 and reprinted at JA 83-249.

JURISDICTION

This Court has jurisdiction of this case pursuant to 28 U.S.C. §1254(1).

The judgment of the Court of Appeals from which the appeal is taken was entered on July 8, 1980. Petitioner's timely petition for rehearing or rehearing en banc was denied on September 9, 1980 (JA 5). On December 4, 1980, Petitioner timely filed its petition for a writ of certiorari, which this Court granted on February 23, 1981 (JA 6).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The texts of Article I, Section 1 of the Constitution of the United States and the Commodity Exchange Act, 7 U.S.C. §§1-24, as amended, are reprinted in the Appendix to Clayton's Petition For A Writ Of Certiorari at A192-A292.

STATEMENT OF THE CASE

This case arises out of commodity futures trading conducted on the New York Mercantile Exchange (the "Exchange") during the months of March, April and May, 1976 involving contracts requiring the delivery of Maine grown potatoes during the month of May, 1976 (the "May Contract").

The Exchange is a board of trade, designated as a "contract market" by the Commodity Futures Trading Commission (the "CFTC") pursuant to Section 5a of the Commodity Exchange Act (the "CEA"), 7 U.S.C. §7a. The Exchange provides an organized, regulated marketplace for trading contracts for the future delivery of certain commodities.

Petitioner, Clayton Brokerage Co. of St. Louis, Inc. ("Clayton") is a futures commission merchant (an "FCM"), registered as such with the CFTC pursuant to Section 4f of the CEA, 7 U.S.C. §6f. Clayton, as an FCM, acts as a broker for persons desiring to trade commodity futures contracts, buying and selling futures contracts for the accounts of its customers on

the various contract markets of which it is a member, all pursuant to the instructions of its customers.[1]

The Respondents (hereinafter sometimes referred to collectively as the "Long Traders"), at all relevant times, were professional participants in the futures markets. Neil Leist was a member of the Exchange, engaged in trading commodity futures for his own account (JA 16). Incomco was a partnership, duly registered with the CFTC as an FCM (JA 16). Philip Smith was the managing partner of Incomco (JA 16).

During the course of trading in the May Contract, the Long Traders acquired substantial long positions in the May Contract, speculating that the price of the contract would rise, enabling them to liquidate their positions at a profit (JA 100). Various other traders, principally John R. Simplot and Peter J. Taggares and/or companies controlled by them, (the "Short Traders") acquired substantial short positions in the May Contract (JA 27). The Short Traders acquired their positions in the May Contract in their accounts with various FCMs, including Clayton, Heinold Commodities, Inc. ("Heinold") and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc. ("TMAK") (JA 97).

As the trading in May Contracts came to its scheduled conclusion, the Long Traders liquidated their long positions in the May Contract by selling offsetting short positions in the May Contract (JA 101). This liquidation was completed on or before May 7, 1976, the date futures trading in the May Contract ended in accordance with the Exchange's rules. The Short Traders' positions were not liquidated before the conclusion of trading and, pursuant to the terms of the May Contract, delivery of 50,000 pounds of Maine potatoes was required to satisfy each

[1] More complete descriptions of the functions and operations of the commodity futures markets and the participants are set forth in the Opinion of the Majority in the Court of Appeals 638 F.2d at 286-88, JA 88-94, and in the Opinion of the District Court, 470 F.Supp. at 1258-59, JA 64-66.

unliquidated short position in the May Contract (JA 27). The Short Traders defaulted on their obligations to make the required delivery (JA 27-28).

In September, 1976, the Long Traders commenced this action in the United States District Court for the Southern District of New York, naming as defendants the Short Traders and their FCMs, including Clayton, Heinold and TMAK, the Exchange and certain of its officers, and certain others, all of whom (with the exception of the Exchange and its officers) were alleged to have participated in a conspiracy to manipulate downward the price of the May Contract (JA 26). The conspiracy allegedly violated the provisions of the CEA, 7 U.S.C. §§1-13[2] (JA 26) and Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1-2 (JA 30), and damaged the Long Traders in the amount of $1,300,000.00 by diminishing the sums received by them on liquidation of their positions in the May Contract. The jurisdiction of the District Court was premised solely upon 28 U.S.C. §§1331, 1337 and Section 4 of the Clayton Antitrust Act, 15 U.S.C. §15 (JA 16).

After discovery, Clayton moved for judgment on the pleadings or alternatively for summary judgment pursuant to Rules 12(c) and 56(b), Fed.R.Civ.P. as to both the claims asserted on the basis of alleged violations of the CEA and the claims asserted on the basis of alleged violations of the Sherman

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[2] Paragraph 60 of the Complaint specifically alleges that "Title 7 U.S.C. Section 13 and rules promulgated by the Commission" were violated (JA 26). The Complaint does not specify which rules of the Commission were allegedly violated or which, if any, other sections of the CEA were allegedly violated. Paragraph 59 of the Complaint (JA 26) alleges that the Defendants engaged in transactions which would and did operate as a fraud and deceit upon purchasers and sellers of Maine potato futures. It is assumed that these allegations were intended to allege a violation of Section 4b. The Court of Appeals treated the case as one in which the following sections of the CEA were at issue: Sections 4a (prohibiting excessive speculation in commodity futures), 4b (prohibiting generally cheating and defrauding of customers), 5(d) (requiring boards of trade to make provisions to prevent manipulation), 5a(8) (requiring boards of trade to enforce their rules), and 9(b) (making manipulation of commodity prices a felony).

Antitrust Act. [3] The District Court granted Clayton's motion in part, dismissing those claims asserted against Clayton which were based on alleged violations of the CEA on the ground that private rights of action against FCMs and boards of trade are not among the remedies available for alleged violations of the CEA.

The Long Traders appealed the Order of the District Court to the Court of Appeals for the Second Circuit.[4] The Court of Appeals, by a 2-1 vote, reversed the Order of the District Court and held that private rights of action are to be implied against FCMs from Sections 4a, 4b[5] and 9(b) of the CEA, 7 U.S.C. §§6a, 6b, 13(b) and against boards of trade from Sections 5(d), 5a(8) and 9(b) of the CEA, 7 U.S.C. §§7(d), 7a(8), 13(b). Judge Mansfield dissented, stating that the Majority's holding rested on a principle of statutory construction which was inapplicable and that it sanctioned the very type of judicial legislation which was rejected, in principle, by this Court in *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11 (1979) and *Touche Ross & Co.* v. *Redington,* 442 U.S. 560 (1979).

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[3] The Exchange and Heinold filed similar motions. TMAK joined in the motions filed by Clayton and Heinold.

[4] The Order of the District Court was entered in respect of claims asserted in several cases all of which arose out of the events described above and were consolidated for pre-trial purposes. The plaintiffs in two other suits, *National Super Spuds, Inc.* v. *New York Mercantile Exchange,* 76 Civ. 2375, 2554, 2571, 2594 (LFM) and *Incomco* v. *New York Mercantile Exchange,* 76 Civ. 2648 (LFM), also appealed from portions of the District Court's Order. The three appeals were consolidated in the Court of Appeals. Clayton was a party only to the appeal in *Leist* v. *Simplot,* No. 79-7402.

[5] The Majority expressly ruled that a private right of action is available for a violation of Section 4b. 638 F.2d at 322, JA 170-71. Apparently, the Majority viewed allegations of the Complaint as sufficient to state a claim based on Section 4b, since it did not affirm the District Court's dismissal of claims arising under Section 4b, but instead indicated that further evidence of the relationships between the plaintiffs and defendants in the District Court would be required to determine whether a violation of Section 4b could be found to have occurred under the facts of this case. 638 F.2d at 323, JA 173.

SUMMARY OF ARGUMENT

The sole question presented is whether a trader of commodity futures contracts has a right of action cognizable in the first instance by a federal district court to recover damages for violations of Sections 4a, 4b or 9(b) of the CEA against a futures commission merchant. Since the asserted right is not expressly conferred by any provision of the CEA, the resolution of the question turns on whether or not Congress affirmatively intended to create that right. *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 15-16 (1979); *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 568 (1979). Evidence of such an intent, if it existed, would be found in the language or structure of the CEA, the legislative history of the statute or the circumstances of its enactment. *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 18. None of these sources discloses any Congressional intent to create private rights of action.

Each of the statutory sections at issue does no more than proscribe certain conduct. None of the provisions creates or alters any civil liabilities, and none, save section 4b, appears by its terms to have been enacted for the benefit of an especial class of persons. Other provisions of the CEA create a panoply of remedies and penalties for violations of these sections of the CEA. These remedies must be presumed to be exclusive. *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. at 19-20.

Sections 4a, 4b and 9(b) were all enacted in 1936, a time at which the courts were narrowly construing statutorily prescribed remedies including those prescribed by the statutory precursor of the CEA. *Wallace* v. *Cutten,* 298 U.S. 229 (1936). Moreover, at the time these provisions were enacted Congress regularly prescribed the remedy it intended to create using express statutory language. *See, e.g.,* 15 U.S.C. §78r. These circumstances demonstrate that Congress did not intend to create a private right of action by implication when it enacted the CEA.

The legislative history of Sections 4a, 4b and 9(b) is silent as to the existence of such rights. The sparse legislative history which exists suggests that when these provisions were enacted, Congress expected private litigants to rely on state rather than federal law to obtain redress for wrongdoing in connection with commodity futures trading.

Subsequent to the enactment of Sections 4a, 4b and 9(b) of the CEA, the CEA was amended, principally in 1974 and in 1978. When these amendments were enacted, Congress refused to enact proposed legislation creating private rights of action similar to those asserted in this case, but created other forms of public and private remedies and eliminated remedies under state law. That rejection of a private right of action confirms that Congress had no intention of creating the private right of action asserted in this case. *National Railroad Passenger Corp.* v. *National Railroad Passenger Ass'n*, 414 U.S. 453 (1974).

ARGUMENT

I.

In Order To Imply A Private Right Of Action From The CEA It Must Be Determined That Congress Affirmatively Intended To Create That Right Of Action

The case presents the question whether traders of commodity futures contracts may invoke the powers of the federal district courts in order to enforce Sections 4a, 4b and 9(b) of the CEA, 7 U.S.C. §§6a, 6b and 13(b), against an FCM.

The CEA expressly specifies several means of redressing violations, but private rights of action such as those found by the Majority in the Court of Appeals are not among them. This Court has long recognized that whether or not a private right of action may be implied from a federal statute is a question to be resolved through a process of statutory construction. *Kissinger* v. *Reporters Committee for Freedom of the Press,* 445 U.S. 136 (1980); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 15; *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 568; *Cannon* v. *University of Chicago,* 441 U.S. 677, 688 (1979); *National Railroad Passenger Corp.* v. *National Railroad Passenger Ass'n,* 414 U.S. 453, 458. Clayton submits that the majority in the Court of Appeals ignored and misapplied these controlling decisions when it recognized private rights of action on the basis of prior court decisions rather than a considered construction of the CEA.

The principles enunciated in this Court's decisions compel federal courts to conduct a particularized search for Congressional intent to create a private right of action before they imply one. This search may entail examination of the text of the statutory provisions relied on, *Touche Ross & Co.* v. *Redington,* 442 U.S. at 568, the legislative history of the provi-

sions, *National Railroad Passenger Corp.* v. *National Railroad Passenger Ass'n*, 414 U.S. at 458-61, the structure of the statute or the circumstances of its enactment, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 18. The objective of the process, however, is "limited solely to determining whether Congress intended to create the private right of action" asserted. *Touche Ross & Co.* v. *Redington*, 442 U.S. at 568; *accord, Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 27 (White, J., dissenting). Unless this Court finds that Congress affirmatively intended to create the private right of action announced by the Court of Appeals, it must reverse the decision of that Court and reinstate the Judgment of the District Court.

The limitation on the scope of this Court's inquiry and the consequences of the inquiry's failure to disclose an affirmative intention by Congress to create the private right of action asserted are dictated by principles of federal law embodied in the Constitution of the United States.

Neither the Constitution of the United States nor any statute enacted in accordance with the provisions of the Constitution has established the common law as an element of federal law. Thus, as this Court stated in *Erie Railroad* v. *Tompkins*, 304 U.S. 64, 77 (1938), "There is no federal general common law." It necessarily follows that a federal right comes only from legislative grant. The general legal principles which may be relied on to establish a right of action based on state law will not support a right of action based on federal law. *Cf. Touche Ross & Co.* v. *Redington*, 442 U.S. at 568 (rejecting argument that tort principles permit the implication of a private right of action from a federal statute). As Mr. Justice Rehnquist stated in *Cannon* v. *University of Chicago*, "while state courts of general jurisdiction still enforcing the common law as well as statutory law may be less constrained than are federal courts enforcing laws enacted by Congress, the latter must surely look to those laws to determine whether there was an intent to create a private right of action under them." 441 U.S. at 717-18 (concurring opinion).

Article I, Section 1 of the Constitution vests the legislative power of the federal government in the Congress alone. Thus, all positive law of the United States must be enacted by Congress. Congress, of course, cannot legislate by inaction.

Since there is no federal general common law, and since all positive federal law must be enacted by an affirmative act of Congress, any right (other than a Constitutional right) claimed to exist as a matter of federal law must exist by virtue of an affirmative act of Congress - i.e. the enactment of a statute. Where the statute claimed to create the right does not do so in unambiguous terms, a court asked to enforce the claimed right may do so only if it appears that Congress affirmatively intended to establish the right when it enacted the statute. If no affirmative intention to create a right can be discerned, then the absence of the affirmative act of Congress which is constitutionally required to create the right must be presumed. If the Court were to presume otherwise, it would inevitably usurp the prerogative of Congress by interpolating its notions of appropriate policy in the interstices of the statute. *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4, 11 (1942); *TVA* v. *Hill*, 437 U.S. 153, 194 (1978). Accordingly, a party asserting a right claimed to have been conferred by a federal statute which does not, in express terms, create the claimed right, must establish the existence of Congress' affirmative intention, when enacting the statute, to create the right sought to be enforced. *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560; *Cannon* v. *University of Chicago*, 441 U.S. 677.

Notwithstanding this firmly established principle, the Majority in the Court of Appeals held that the unique question to be decided in this case was not what Congress intended in the first instance but whether or not Congress "intended *sub silentio* to alter the significance" given by a few lower federal courts to the CEA when Congress amended the CEA in 1974. *Leist* v.

Simplot, 638 F.2d at 303, JA 127. According to the Majority, the lower federal courts' entertainment of private civil actions under the CEA prior to 1974 obviated any need to examine whether Congress affirmatively intended to create private rights of action either in the first instance or when the CEA was amended in 1974. This mode of analysis clearly subverts the constitutional principle of separation of powers by circumventing the process of statutory construction dictated by that principle and clearly delineated by this Court's recent decisions. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11; *Touche Ross & Co.* v. *Redington*, 442 U.S. 560. Furthermore, without engaging in any analysis of the Sections of the CEA allegedly violated by Clayton, much less evaluating any other indicia of legislative intent such as the structure of the statute or its legislative history, the Majority determined that a private right of action existed, not just for violations of particular sections of the CEA, but for violations of the CEA generally. 638 F.2d at 303, JA 127-28. The Majority then considered whether the general right of action which it found had been repealed. *Id.*

Before a court can reach the issue of whether Congress intended to repeal a particular federal right it must be established that the right was created by Congress in the first instance. Proper analysis of those factors which demonstrate whether Congress intended to create private rights of action based on Sections 4a, 4b or 9(b) of the CEA compels the conclusion that such rights do not now - and never did - exist.

II.

The Language And Structure Of The Commodity Exchange Act Belie Any Congressional Intention To Create Statutory Rights By Implication

Ordinarily, Congress' intent to grant a particular right will be evident from the text of the statute claimed to confer the right or remedy. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560,

568-69; *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 238 (1969). The text of the CEA, however, is devoid of any indication that Congress intended to create a private right of action to remedy violations of Section 4a, 4b or 9(b) of the CEA. In fact, the CEA, by its express terms, creates a complex and meticulously detailed regulatory scheme which, by its comprehensive nature, evinces Congress' intention to deny such a remedy.

A. Sections 4a, 4b and 9(b) of the CEA are merely proscriptions of certain conduct

Each section of the CEA allegedly violated by Clayton proscribes certain forms of conduct. None of these Sections, however, "in terms create[s] or alter[s] any civil liabilities." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 19. The proscriptive language chosen by Congress has none of the characteristics suggestive of an intention to create the private right of action sought in this case.

1. Section 4a of the CEA

Section 4a prohibits excessive trading in commodity futures contracts. In pertinent part, it provides:

> (1) Excessive speculation in any commodity under contracts of sale of such commodity for future delivery made on or subject to the rules of contract markets. . . is an undue and unnecessary burden on interstate commerce in such commodity. For the purpose of diminishing, eliminating, or preventing such burden, the commission shall. . . by order, proclaim and fix. . . limits on the amounts of trading which may be done or positions which may be held by any person under contracts of sale of such commodity for future delivery . . . .
>
> (2) The commission shall, in such order, fix a reasonable time after which it shall be unlawful for any person --

. . . .

(B) directly or indirectly to hold or control a net long or a net short position in any commodity for future delivery on or subject to the rules of any contract market in excess of any position limit fixed by the commission for or with respect to such commodity. . . . 7 U.S.C. §6a.

Nothing in the language of this provision suggests that Congress intended that by violating its terms, a person would incur some form of civil liability to private persons. The provision does not void or otherwise impair the validity of transactions which are effected in contravention of its terms. *See Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 17. There is no class of persons designated as the intended beneficiary of the provision,[4] and certainly no focus on such a class. *See Cannon* v. *University of Chicago*, 441 U.S. 677, 691-92. No affirmative rights in any form are conferred by Section 4a. *See Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). The text of Section 4a is simply devoid of any hallmarks of Congressional intent to create a private right of action.

2. Section 4b of the CEA

Section 4b prohibits contract market members from engaging in certain forms of conduct in connection with transactions in commodity futures contracts. In pertinent part, Section 4b provides:

> It shall be unlawful (1) for any member of a contract market, . . . in or in connection with any order to make, or the making of any contract of sale of any commodity . . . for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making

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[4] If, by looking beyond the express terms of Section 4a, an "especial class" could be found, it would certainly not include speculators such as the Long Traders. Section 4a is "primarily intended to protect outsiders from the activity of all speculators, not speculators from each other." *Liang* v. *Hunt*, 477 F.Supp. 891, 893 (N.D. Ill. 1979).

> of, any contract of sale of any commodity for future delivery. . . for or on behalf of any other person. . .
>
> (A) to cheat or defraud or attempt to cheat or defraud such other person;
>
> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
>
> (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; . . . . 7 U.S.C. §6b.

The language of Section 4b closely resembles the language of Section 206 of the Investment Advisors Act, 15 U.S.C. §80b-6, considered by this Court in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11. In language similar and, in part, identical to that of Section 206, Section 4b prohibits certain professionals in the industry regulated by the statute from engaging in certain forms of conduct deemed by Congress to be detrimental to the interests of those persons with whom the professionals transact business. It can, therefore, be inferred that Congress enacted Section 4b in order to afford some type of protection to persons transacting business with contract market members. *Id.* at 17.[7] Section 4b, however, is silent as to the nature of the protection which Congress intended to provide. Unlike other statutes which have been found by this Court to have implicitly

[7] The enactment of a federal statute for the benefit of an especial class of persons does not inevitably create a private right of action on behalf of such persons to enforce the statute's provisions. The common law rule which holds to the contrary as to state statutes is simply inapplicable to federal statutes. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568.

provided for private rights of action, Section 4b does not, of itself, create or alter any affirmative rights, *see, e.g.*, 15 U.S.C. §80b-15, considered in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 18-19 (certain contracts declared void); nor was it drafted with an unmistakable focus on the benefited class, *see, e.g.*, 15 U.S.C. §78j(b), considered in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 728 (1975) ("for the protection of investors"). By its terms Section 4b is merely proscriptive. Its text, therefore, provides no evidence of any Congressional intent to create a private right of action. *Cannon* v. *University of Chicago*, 441 U.S. at 691.

3. Section 9(b) of the CEA

Section 9(b) declares certain forms of conduct, particularly manipulation of commodity prices, to be felonies. In pertinent part, Section 9(b)[4] provides:

> It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, . . . or knowingly to violate the provisions of Section 6, 6b, 6c(b) through 6c(e), 6h, 6o(1), or 23 of this title . . . . 7 U.S.C. §13(b).

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[4] As originally enacted, Section 9 of the CEA declared certain conduct to be a misdemeanor. In 1968, Section 9 was amended. Pub. L. No. 90-258, 82 Stat. 26 (1968). The effect of this amendment was to make manipulation of commodity prices a felony pursuant to what is now Section 9(b) of the CEA, 7 U.S.C. §13(b). The references in 7 U.S.C. §13(b) to Sections "6, 6b, 6c(b) through 6c(e), 6h, 6o(1) or 23" were added by the Futures Trading Act of 1978, Pub. L. No. 95-405, §19(2), 92 Stat. 865, 875 (1978). Prior to that time, violation of those provisions had been a misdemeanor pursuant to Section 9(c) of the CEA, 7 U.S.C. §13(c).

Section 9(b) is similar in form to 18 U.S.C. §610, considered by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975). Like Section 610, Section 9(b), in terms, "is only a criminal statute, providing a fine or imprisonment for its violation." *Cort* v. *Ash*, 422 U.S. at 74. Section 9(b) does not purport to affect the validity of transactions done in contravention of its terms, creates no affirmative rights on behalf of any person or class of persons, and does not describe any class of persons as its intended beneficiaries. The intended remedy for violations of Section 9(b) is set forth in the text of that provision: fine and/or imprisonment. No mention is made in Section 9(b) of an intended civil remedy to parallel the criminal penalties imposed by Section 9(b). It is simply impossible to discern any Congressional intent to create a private right of action from the text of Section 9(b).

B. The CEA makes express provisions for both public and private remedies for conduct violative of its provisions

Sections 4a, 4b and 9(b) of the CEA were enacted in 1936.[9] Since that time, they have been enforceable through a network of administrative and judicial proceedings prescribed in meticulous detail by other provisions of the CEA. Although the prescribed remedies have been embellished since 1936, the comprehensive nature of the prescribed remedies, both originally and presently, precludes any inference that "Congress absentmindedly forgot to mention an intended private action." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 20, *quoting Cannon* v. *University of Chicago*, 441 U.S. at 742 (Powell, J., dissenting).

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[9] Section 9(b) did not come into existence as a separate subparagraph of Section 9 of the CEA until 1968, when Congress enacted Pub. L. No. 90-258, 82 Stat. 26. A portion of what is now Section 9(b) was enacted as Section 9 of the Grain Futures Act of 1922, ch. 331, 369, 42 Stat. 998 (1922). The critical language of Section 9(b) - that making manipulation of commodity futures prices illegal - was enacted in 1936, pursuant to Section 11(b) of the Commodity Exchange Act, ch. 545, 49 Stat. 1501 (1936).

1. The CEA, as enacted in 1936, made express provision for all remedies determined to be appropriate

Under the CEA as originally enacted, the remedies for violations of Sections 4a and 4b were described in Sections 6(b), 6(c) and 9 (now 9(c)) of the CEA, 7 U.S.C. §§9, 13b, 13(c). Under Section 6(b), the Secretary of Agriculture was empowered to initiate an administrative proceeding to determine whether any person had violated any provision of the CEA. If it was determined that the person had committed a violation of the CEA, the Secretary could bar such person from any further participation in trading conducted on contract markets and, if the person was a registered FCM or floor broker, suspend or revoke his registration as such.[10] Section 6(c) of the CEA authorized the Secretary of Agriculture, after hearings, to enter cease and desist orders against any person found to have manipulated or to have attempted to manipulate the market price of a commodity, or otherwise to have violated the CEA. The violation of a cease and desist order was a crime, punishable by fine and/or imprisonment. Section 9 made violations of Sections 4a or 4b of the CEA a misdemeanor, punishable by fine and/or imprisonment.[11]

Section 9(b) (formerly Section 9) needed no separate provision of the CEA to prescribe a remedy, since by its own terms it imposed penalties of fines and/or imprisonment. Congress did not, however, rely on the harsh sanctions imposed by

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[10] The suspension or revocation of an FCM's or a floor broker's registration effectively precluded such person from pursuing his employment in the industry regulated by the CEA, since registration was made a prerequisite to engaging in business as a FCM or floor broker. *See* 7 U.S.C. §§6d, 6e.

[11] Violation of Section 4b is now a felony, rather than a misdemeanor. *See* note 8 *supra*.

Section 9(b)'s own terms as the exclusive means of enforcing the CEA's proscription of manipulation of commodity prices. The same conduct proscribed by Section 9(b) could also be dealt with in an administrative context pursuant to Section 6(c) of the CEA.

Congress did not create any private remedy for conduct violative of the CEA when it enacted the statute in 1936. Congress did, however, expressly recognize in the text of the CEA that certain private remedies should exist. Section 4c of the CEA provided, in part:

> Nothing in this section or in section 4b shall be construed to impair any state law applicable to any transaction enumerated or described in such sections. 7 U.S.C. §6c (1970) (repealed, 1974).[12]

At that time, traders in commodity futures routinely litigated their claims against one another and their brokers in state courts.[13] It is apparent from Section 4c of the CEA that Congress, in 1936, determined that state courts provided the appropriate forum to adjudicate such disputes and state law provided the appropriate standards to be applied in such adjudication. By contrast, the CEA made no mention of any remedies for conduct violative of Sections 4a and 9(b) of the CEA other than those expressly provided for by the CEA. In light of Congress' meticulous drafting of Section 4c, it must be concluded that Congress did not intend to permit any private remedies for conduct violative of these provisions.[14]

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[12] In 1974, Congress repealed the quoted language of Section 4c. Commodity Futures Trading Commission Act, Pub. L. No. 92-463, §402(d), 88 Stat. 1413 (1974).

[13] *See, e.g., Kouns* v. *Myers,* 118 Kan. 221, 235 P. 122 (1925); *Alexas* v. *Post & Flagg,* 129 S.C. 53, 123 S.E. 769 (1924); *Minnesota Grain Co.* v. *National Wool Growers Dep't,* 152 Minn. 521, 189 N.W. 590 (1922); and *Watkins* v. *W. E. Neiler Co.,* 135 Minn. 343, 160 N.W. 864 (1917).

[14] The legislative history of Section 4c demonstrates that Congress was of the view that but for the express language in Section 4c preserving state law, Sections 4b and 4c of the CEA would have preempted state law. *See* discussion *infra,* at 29-30, n.28.

2. The expansion in 1974 and again in 1978 of the remedies available for violations of the CEA further demonstrates Congressional intent to create a comprehensive regulatory scheme which does not include private rights of action

In 1974, Congress enacted the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (1974) (the "CFTC Act"), amending the CEA. In 1978 the CEA was once again amended by the Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865 (1978) (the "1978 Amendments"). Sections 4a, 4b and 9(b) of the CEA were amended in certain respects by those acts, but those amendments were confined to conforming the terminology used in the text of these provisions to that necessitated by the transfer of the Secretary of Agriculture's duties under the CEA to the CFTC and to increasing the magnitude of the penalties prescribed by Section 9(b). The amendments to sections 4a, 4b and 9(b) did not alter the description of the conduct proscribed by their terms. They did not alter the manner in which the conduct was proscribed. The amendments did not confer any new rights on any especial class of persons, nor did they describe an especial class of persons as the intended beneficiaries of these provisions. Clearly, the amendments do not suggest an intention to change the significance given sections 4a, 4b or 9(b) when these provisions were enacted in 1936. Nevertheless, each court which has addressed the question of whether or not Congress intended to create private rights of action has devoted most of its attention, erroneously we believe, to an analysis of the impact of the amendments to the CEA. It is clear from the changes effected by the CFTC Act and by the 1978 Amendments that the Ninety-Third Congress and the Ninety-Fifth Congress, like the Seventy-Fourth Congress which enacted Sections 4a, 4b and 9(b), did not contemplate that their actions would create a private right of action for violation of those sections.

The CFTC Act altered and embellished the administrative and judicial proceedings available to enforce the provisions of

the CEA, creating an even more complex and meticulously detailed system of enforcement than had existed under the CEA as originally enacted. The most notable changes were the creation of new judicial proceedings to enforce the CEA, the inclusion of provisions expressly creating private remedies as a matter of federal law, and the concomitant elimination of remedies under state law.

The administrative and criminal proceedings previously provided for by Sections 6(b) and 6(c) of the CEA were altered by transferring the powers of the Secretary of Agriculture under those provisions to the CFTC. In addition, pursuant to Section 211 of the CFTC Act, 7 U.S.C. §13a-1, the CFTC was empowered to apply to federal district courts for injunctions enjoining violations of the CEA, and the district courts are specifically empowered to issue such injunctions.

Pursuant to Section 209 of the CFTC Act, 7 U.S.C. §7a(11), each contract market is now compelled to make arbitration available to traders to resolve disputes with contract market members. Pursuant to Section 106 of the CFTC Act, 7 U.S.C. §18, a reparations proceeding conducted by the CFTC was established to permit any person complaining of any violation of the CEA by an FCM, a floor broker,[15] an associated person,[16] a commodity trading advisor[17] or a commodity pool

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[15] Floor brokers are the individuals who actually execute the trades of commodity futures contracts in the trading pits on the floor of the contract markets. They are required to be registered with the CFTC pursuant to 7 U.S.C. §6e.

[16] Associated persons are the employees of FCM's who are responsible for the solicitation or acceptance of an FCM's customer's orders or for supervising persons having such responsibilities. They are required to be registered with the CFTC pursuant to 7 U.S.C. §6k.

[17] Commodity trading advisors are persons who, for separate compensation, provide advice regarding the value of commodities or the advisability of trading commodity futures contracts. They are required to be registered with the CFTC pursuant to 7 U.S.C. §6m.

operator[18] to recover the damages he sustained as a consequence of the violation.[19] The determinations of the CFTC respecting reparations claims are reviewable by the Courts of Appeals, and the judgements rendered by the CFTC are enforceable by the federal district courts. "Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Touche Ross & Co.* v. *Redington,* 442 U.S. at 572.

The establishment of these proceedings to permit private persons to obtain redress for violations of the CEA obviated the need for the state law remedies previously preserved by Section 4c of the CEA. Section 402(d) of the CFTC Act, Pub. L. No. 93-463, §402(d), 88 Stat. 1413, repealed the language of Section 4c which, until 1974, had assured that private remedies for conduct violative of the CEA would be avilable if such conduct was actionable on the basis of state law.

The 1978 Amendments were intended to correct perceived shortcomings of the regulatory scheme, including the inability

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[18] Commodity pool operators in the commodity futures industry are roughly analogous to the investment companies in the securities industry. They are required to be registered with the CFTC pursuant to 7 U.S.C. §6m.

[19] As a practical matter, reparations will be available every time the CEA is violated and some person harmed. The registration provisions of the CEA are so broad that it is virtually impossible to effect a transaction in commodity futures without the participation of persons who are registered or required to be registered under the CEA. Section 13 of the CEA, 7 U.S.C. §13c, subjects any person who aids and abets a violation of the CEA to liability as a principal in administrative proceedings under the CEA, such as reparations. Even in the hypothetical situation in which no person registered or required to be registered with the CFTC can be held liable for a violation of the CEA, the *parens patriae* proceedings authorized by 7 U.S.C. §13a-2 may be relied on to secure a remedy on behalf of those injured by the violation. Thus, there is no need for the concern expressed by the Majority in the Court of Appeals, 638 F.2d at 312, JA 148-49, that persons aggrieved by violations of the CEA will be without a remedy.

of state officials to protect their citizenry due to the bar to *parens patriae* suits based on the CEA .[20] This was remedied by Section 15 of the 1978 Amendments which authorizes state officials[21] to bring a proceeding in a federal district court to enjoin violations of the CEA or to recover damages stemming from such violations on behalf of the citizens of the state. 7 U.S.C. §13a-2(1), (2). This provision requires that the CFTC be notified of the institution of the proceedings, and provides the CFTC with an absolute right to intervene in such proceedings. 7 U.S.C. §13a-2(3). If Congress thought it necessary to enact a provision specifically empowering state governments to exercise their prosecutorial powers and enforce the law, it taxes the imagination to suggest that private citizens already had a private right of action to enforce the same statutory provisions even in the absence of an explicit legislative grant.

These changes in the CEA established a comprehensive and pervasive system of regulating the commodity futures industry based entirely on federal law.[22] Except in the cases of imposition of criminal penalties, securing injunctive relief, and under certain limited circumstances, securing recovery of damages for violations of the CEA, all of the regulatory and enforcement machinery envisioned by the drafters of the CEA and its amendments - licensing and registration, rulemaking, enforcement, adjudication of damage claims - has been consolidated and vested in a single independent federal agency, the CFTC. Where the

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[20] *See Extend Commodity Exchange Act: Hearings On H.R. 10285 Before the Subcommittee on Conservation and Credit of the House Committee on Agriculture*, 95th Cong., 2d Sess. 174-75 (1978) (remarks of Conrad Goodkind, Wisconsin Commissioner of Securities).

[21] The designated officials are the attorney general of any state, the administrator of the securities laws of any state, or another official designated by a state. 7 U.S.C. §13a-2(1).

[22] Section 15 of the 1978 Amendments does preserve state law to the limited extent that state officials may enforce the state's antifraud statutes. 7 U.S.C. §13a-2(7). Thus the state's police powers are preserved to a limited extent.

machinery of enforcement is not vested exclusively with the CFTC, i.e., where the courts and/or other government agencies are involved in enforcement, the CFTC is expressly empowered to participate as a party in all cases other than criminal proceedings.

The complex and comprehensive nature of the regulatory scheme explicitly provided for by the CEA in 1936, by the CFTC Act in 1974, and the 1978 Amendments compels the conclusion that Congress did not at any time intend to create some unspecified additional form of remedy for conduct proscribed by Sections 4a, 4b and 9(b) of the CEA. As this Court stated in *Switchman's Union of North America* v. *National Mediation Board,* 320 U.S. 297, 301 (1943), discussing the availability of judicial review to remedy an allegedly erroneous decision of the National Mediation Board made pursuant to Section 2, Ninth of the Railway Labor Act, 45 U.S.C. §152:

> Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end . . . [i]t is for Congress to determine how the rights which it creates shall be enforced. [Cases omitted]. In such a case the specification of one remedy normally excludes another.

III.

The Circumstances Under Which The CEA And The CFTC Act Were Enacted Preclude The Possibility That Congress, On Either Occasion, Assumed That A Private Right Of Action Would Be Implied From The CEA

This Court has, in the past, concluded on the basis of a peculiar set of circumstances which were extant at the time of a statutory enactment that Congress intended to create a private right of action to remedy particular conduct prohibited by the

statute. *See Cannon* v. *University of Chicago,* 441 U.S. 677. In *Cannon,* the Court found that Congress intended to create a private right of action *when it enacted* Title IX of the Education Amendments of 1972. The Court's conclusion was based on the fact that Title IX was explicitly patterned after Title VI of the Civil Rights Act of 1964. 441 U.S. at 694. When Title IX was enacted, Title VI had been uniformly found to support private rights of action, notwithstanding the absence of any mention of such a remedy in the text of Title VI. Thus, it was apparent to the Court that Congress, *when it enacted* Title IX, must have intended and expected that Title IX would likwise support private rights of action. 441 U.S. at 697-703. The circumstances which surrounded the enactment of the Commodity Exchange Act in 1936 and the CFTC Act in 1974 make it apparent that neither the Seventy-Fourth Congress, which enacted the CEA, nor the Ninety-Third Congress, which enacted the CFTC Act, could have reasonably expected that the Courts would imply a private right of action from the CEA.

During the Congressional term immediately preceding the term in which the CEA was enacted, Congress had enacted the Securities Act of 1933, 15 U.S.C. §§77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. §§78a *et seq.* The federal securities laws prescribed in express terms the rights of certain persons to recover damages for violations of certain provisions of these statutes through civil actions in federal district court. *See, e.g.,* 15 U.S.C. §§77k, 1, § 78r. The Congress which enacted the CEA was certainly aware of the new securities laws. The floor debates on the CEA contain express references to those statutes. *See* 79 CONG. REC. 8589 (1935) (statement of Rep. Jones); 80 CONG. REC. 7858-59 (1936) (remarks of Senator Murray). Despite Congress' familiarity with the securities laws which made express provision for such private remedies as were intended to be created thereby, the CEA, as enacted in 1936,

made no provision whatsoever for private enforcement of any of its provisions.[23]

At the time Congress was considering the CEA, the federal courts, including this Court, had adopted a strict approach to construction of federal statutes, including the Grain Futures Act, the precursor of the CEA.[24] In the case of *Cutten* v. *Wallace,* 80 F.2d 140 (7th Cir. 1935), *aff'd sub. nom. Wallace* v. *Cutten,* 298 U.S. 229 (1936), the Court of Appeals for the Seventh Circuit reversed an order of the Secretary of Agriculture entered pursuant to Section 6(b) of the Grain Futures Act, [25] barring Arthur W. Cutten from trading on contract markets. The court's decision was based upon its determination that the Grain Futures Act should be narrowly construed to create a remedy only in the case of ongoing violations of the statute. 80 F.2d at 142-44. The Senate was specifically informed of this narrow construction of the Grain Futures Act's remedial provison, as well as of this Court's decision affirming the Seventh Circuit's decision. *See* 80 CONG. REC. 6160 (1936) (remarks of Senator Connally); 80 CONG. REC. 7858 (1936) (remarks of Senator Murray). The CEA contained a provision amending Section 6(b) of the Grain Futures Act which was specifically intended to alleviate the consequences of the *Cutten* case. 80 CONG. REC. 7858 (1936) (remarks of Senator Murray).

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[23] *Baird* v. *Franklin,* 141 F.2d 238 (2d Cir.), *cert. denied,* 323 U.S. 737 (1944) and *Kardon* v. *National Gypsum Co.,* 69 F.Supp. 512 (E.D.Pa. 1946), implying private rights of action under the federal securities laws, had not been decided when Congress enacted the CEA in 1936. There was no way that Congress could have known, in 1936, that the courts would recognize private rights of action to be implicit in the federal securities laws.

[24] The Commodity Exchange Act, ch. 545, 49 Stat. 1494 (1936), amended and renamed the Grain Futures Act, ch. 369, 42 Stat. 998 (1922).

[25] Section 6(b) of the Grain Futures Act, as amended, is the statutory provision that is now Section 6(b) of the CEA, discussed *supra,* at 17.

When Congress enacted Sections 4a, 4b and 9(b) of the CEA, the implication of private rights of action was confined to the most narrow parameters. *See Cannon* v. *University of Chicago*, 441 U.S. at 732-35 (Powell, J., dissenting). It is inconceivable that a Congress which was enacting legislation which made no express provisions for private remedies, and was intended to amend the Grain Futures Act, the remedial provisions of which had to Congress' knowledge been recently construed by the Supreme Court to be confined to their literal terms, could have thought, much less intended, that courts would recognize a private right of action to be implicit in the provisons of the CEA. *Cf. Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 21 (refusing to imply private damages remedy from Investment Advisors Act, modeled after earlier enacted securities laws which described similar remedies in express terms).

In 1974, while Congress was considering the CFTC Act, this Court decided *National Railroad Passenger Corp.* v. *National Railroad Passenger Ass'n*, 414 U.S. 435, 458 (1974), reiterating the principle that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." 414 U.S. at 458. Although the decision is not referred to by name in the legislative history of the CFTC Act, reference to the principle enunciated by this Court was made during the Hearings before the Senate Committee on Forestry and Agriculture. *See, e.g. Hearings on S.2483, S.3578, S.2837 and H.R. 13113*, (pt. 3) 93d Cong., 2d Sess. 737, 746 (1974) (statement of Roy A. Schotland). Professor Schotland, speaking of the reparations proceedings, advised the Senate Committee that "if you do choose to retain any such virtually unprecedented responsibility and burden in this regulatory body, there should be explicit language in the statute that federal and state courts are still open if a complainant prefers to go to trial there." *Id.* at 737. As enacted, the section of the CEA establishing the reparations procedure contains no such language.

Unlike the Congress which enacted Section 4c of the CEA preserving substantive state law remedies, the Congress which enacted the CFTC Act did not retain or incorporate into any section of the CEA proscribing any type of conduct or providing for any particular form of remedy a caveat stating or otherwise indicating Congress' intention that the statutory provision was not intended "to impair" the applicability of any other law or to provide the exclusive remedy.[26] In fact, as pointed out above, *supra*, at 21, that Congress repealed the only previously enacted caveat of this type in the CEA. This hardly suggests that Congress could have thought that a private right of action would be implied from the CEA after 1974.

IV.
The Legislative History Of The CEA And Its Amendments Is Devoid Of Any Indication That Congress Intended To Create A Private Right Of Action

Relying on legislative history in divining the intent of Congress is a step to be taken only with great caution. *Department of the Air Force* v. *Rose*, 425 U.S. 352, 388-89 (1976) (Burger, C.J., dissenting). The legislative history of the CEA would have to contain extremely persuasive evidence of a legislative intent to create a private right of action such as the one here asserted in order to overcome the statute's indicia of the absence of any such congressional intent. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 20. The legislative history of the CEA and its amendments, however, simply confirms what analysis of

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[26] Congress did, in 1974, enact a provision which was intended to assure that the CEA would not be construed to pre-empt federal antitrust laws, insofar as they are otherwise applicable to commodity futures trading, or those portions of state law, such as the Uniform Commercial Code, which govern the contract rights which are created as a necessary incident to commodity futures trading. The significance of this provision is discussed *infra* at 36-41.

their texts reveals: Congress did not intend to create private civil actions for damages based on violations of the CEA generally, particularly for violations of Sections 4a, 4b, and 9(b) thereof.

A. The legislative history of the CEA enacted in 1936 demonstrates that there was no intention on the part of the Congress which enacted Sections 4a, 4b and 9(b) to create a private right of action

In all of the various committee reports and floor debates on the Commodity Exchange Act enacted in 1936, there is no indication that even one Congressman who participated in the enactment of that statute in 1936 intended or expected that the CEA would create a private right of action. In fact, there is no mention of private rights of action based on any provision of the CEA. There is no mention of any private remedies for conduct violative of Sections 4a and 9(b) of the CEA. The few references to private remedies which do exist are confined to discussions of Section 4b. Those references indicate that in 1936, Congress deemed it appropriate to leave private remedies for conduct violative of Section 4b to state law.

The first and the only explicit reference to private litigation based on transactions in commodity futures appears in a report of the House Committee on Agriculture on H.R. 12287, an early version of the bill which was to become the Commodity Exchange Act. H.R. Rep. No. 1551, 72d Cong., 1st Sess. 1 (1932). Section 4b of the CEA apparently was first proposed in H.R. 12287. The Report discloses that there was substantial opposition to Section 4b on the basis that cheating and fraud were matters appropriately dealt with under state laws. H.R. Rep. No. 1551, 72d Cong., 1st Sess. 3 (1932). The Report concluded, however, "that those who trade in the futures markets are in no position to obtain the necessary evidence with which to proceed against unscrupulous dealers. They are not even in a position always to know the extent to which they have been cheated by dishonest brokers and commission firms." *Id.*

Section 4b, in conjunction with a proposed amendment to Section 8 of the Grain Futures Act,[27] was seen as a means to alleviate these barriers to effective use of state law remedies for cheating and fraud occurring in connection with commodity futures trading. By making these activities violative of the CEA, Congress brought them within the scope of the broad investigatory and remedial powers given to the Secretary of Agriculture (in whom primary responsibility for enforcing the CEA was vested until 1974) under Section 6 of the Grain Futures Act (now Section 6 of the CEA, 7 U.S.C. §8). The amendment to Section 8 of the Grain Futures Act which was contained in H.R. 12287 required the Secretary of Agriculture to make public the names of persons found, after investigations conducted pursuant to Section 6 of the statute, to have violated Section 4b and authorized the Secretary to issue reports disclosing the facts of the pertinent transactions. H.R. Rep. No. 1551 at 2, 9.

When the CEA was enacted in 1936, amending and renaming the Grain Futures Act, both Section 4b and the amendment to Section 8 of the Grain Futures Act were enacted into law in form substantially identical to that appearing in H.R. 12287. The legislative history of H.R. 6772, the bill which was enacted as the Commodity Exchange Act, ch. 545, 49 Stat. 1491 (1936), confirms that the Congress which enacted Section 4b contemplated that it would function in the same fashion intended when it was first proposed.[28]

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[27] Section 8 of the Grain Futures Act became Section 8 of the CEA, 7 U.S.C. §12, in 1936.

[28] In H.R. Rep. No. 421, 74th Cong., 1st Sess. (1935), the House Committee on Agriculture affirmed its intention that state law should be applicable to certain aspects of commodities transactions, stating:

> Neither section 4b nor section 4c has the effect, in providing for Federal regulation of the transactions prohibited by their terms, of preventing the application of State laws to the acts prohibited and the persons performing them. An express provision is inserted at the end of section 4c indicating that the intention of the law is not to occupy the field to the exclusion of the States.

This legislative history demonstrates that Section 4b was not enacted to create a new form of private remedy for conduct already prohibited by and remediable under state law, but rather to provide a means by which such conduct might be brought to light, assisting those injured to assert their state law remedies. The preservation of an existent private remedy attests that Congress did not intend to create any implied federal remedy.

B. The legislative history of the CFTC Act and the Futures Trading Act Of 1978 confirms the absence of any intent to create a private right of action

Further confirmation that Congress did not intend to create private rights of action against FCMs such as Clayton is found in the legislative history of both the CFTC Act and the 1978 Amendments.

The House Committee on Agriculture's report on the CFTC Act indicates that it was intended to "provide the first complete overhaul of the Commodity Exchange Act since its inception, and proposes a *comprehensive* regulatory structure to oversee the volatile and esoteric future trading complex." H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 1 (1974) (emphasis added). As described above, *supra,* at 19-23, the CFTC Act accomplished its intended purposes.

The 1978 Amendments were essentially designed to cure the weaknesses of the regulatory scheme as those weaknesses were perceived in light of four years' experience with the CFTC Act. The 1978 Amendments made further changes to the enforcement system established by the CEA. The legislative history of

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H.R. Rep. No. 421 at 5. The "express provision" referred to in the Committee's report is the same provision of Section 4c which is quoted at p. 18 *supra*. During the Senate debates on the bill it was confirmed that Section 4b was enacted to provide a means of exposing wrongdoing in the commodity futures markets. *See* 80 CONG. REC. 7911 (1936) (colloquy of Senators Copeland and Smith).

these changes confirm Congress' intention that private rights of action have no place in the regulatory system.

1. Congress rejected importunings to create the remedy now asserted

Testimony received by the congressional committees which were considering the form the CFTC Act should take included suggestions to the committees that the CFTC Act should include a provision expressly establishing a private right of action for damages caused by violations of the Act. *See, e.g., Commodity Futures Trading Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113,* 93d Cong., 2d Sess. 728, 737 (1974) (statements of Jerome P. Weiss and Roy A. Schotland). Even more significantly, one proposed version of the CFTC Act, S. 2837, made express provision for such a private right of action in addition to allowing treble damages for willful violations.[29] Section 505 of that bill read:

CIVIL ACTION FOR DAMAGES

> SEC. 505 (a) Any person who is injured by a violation of any provision of this Act or regulation or order issued thereunder by the Commission or any exchange, may bring a civil action for restitution in any district court having jurisdiction of the party who caused such injury. In any such action, an order of the Commission pursuant to section 406(a)(3) of this Act shall constitute prima facie evidence as to liability between the parties.
>
> (b) Any person who is injured by a willful violation of any provision of this Act, or regulation or order issued thereunder may bring a civil action for threefold the

[29] Two other proposed versions of the CFTC Act, H.R. 11195 and S.2578 also contained provisions which would have expressly established the right of persons injured by violations of the CEA to sue for damages in federal court. Those provisions, however, would have created treble damage actions for any violation of the CEA.

damages sustained by him, and the cost of suit including reasonable attorney's fees, in any district court having jurisdiction of the party who caused such injury. *Commodity Futures Trading Commission Act: Hearings Before the Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113*, 93d Cong., 2d Sess. 118-19 (1974) (text of S. 2837, introduced by Senator Hart).

This provision for a private civil action was rejected by Congress when the Senate acceded to the House version of the CFTC Act in 1974.[10]

In 1978, when Congress was reviewing the Act with a view towards further strengthening regulation of the commodity futures industry, Congress was aware that some courts had refused to imply private rights of action from the CEA. 124 CONG. REC. 10537 (1978) (remarks of Senator Huddleston).

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[10] The development of the CFTC Act through its various drafts suggests that the provision creating the reparations proceedings was enacted in lieu of provisions establishing the right of private persons to recover damages through civil lawsuits. The first version of the CFTC Act proposed in the House of Representatives was H.R. 11195, introduced on October 30, 1973. Section 17 of H.R. 11195 would have permitted persons injured by violations of the CEA to recover treble damages from the violator. H.R. 11955, introduced on December 13, 1973, contained most of the same features as H.R. 11195, but contained no provision for private lawsuits based on violations of the CEA. Section 105 of H.R. 11955, however, would have established the reparations proceedings in substantially the same form in which they were ultimately enacted. H.R. 13113, the bill which emerged from the House Committee on Agriculture and was adopted by the House of Representatives, provided for reparations but not private suits. After H.R. 13113 was passed by the House of Respresentatives, it, along with 3 Senate versions of the CFTC Act, S.2485, S.2578, and S.2837, was considered by the Senate Committee on Agriculture and Forestry. Two of the Senate bills, S.2578 and S.2837, contained provisions expressly establishing the right of persons injured by violations of the CEA to sue the violator for damages. Neither of these bills made any provisions for reparations, and S.2485 made no provision for either type of remedy. The Senate adopted H.R. 13113.

Nevertheless, despite making "significant changes in the Act," *S. Rep. No. 95-850*, 95th Cong, 2d Sess. 1 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1087, 1089, Congress failed to enact any provision which would expressly create a private cause of action.

The legislative histories of the CFTC Act and the 1978 Amendments show that Congress, after being fully informed in 1974 of the desirability of specifically creating a private right of action, rejected bills that would have established a private right of action for violations of the CEA and then, in 1978, again failed to make express provisions for such a right despite the acute awareness of at least those members of the Ninety-Fifth Congress who favored the availability of private rights of action under the CEA that the courts were refusing to recognize such a right of action in the absence of an express provision in the CEA. Where, as here, Congress has rejected a private right of action, the courts should not imply its existence. *National Railroad Passenger Corp.* v. *National Railroad Passengers Ass'n*, 414 U.S. 453.

2. Arbitration and Reparations were the only private remedies contemplated by Congress

The legislative histories of the CFTC Act and the 1978 Amendments demonstrate that, along with the arbitration proceedings which the CFTC Act required contract markets and registered futures associations to implement, the reparations proceedings were viewed by Congress as the only form of private remedy for violations of the Act.

In 1974 the House Committee on Agriculture stated that the reparations procedure is:

> intended as a separate remedy designed to supplement the informal 'settlement procedures' contemplated of contract markets and registered futures associations which are required under other sections of the legislation (H.R. 13113,

> Sections 209 and 301). . . . *It is the intent of the Committee that those complaints which can be resolved informally and settled without a formal proceeding [the reparations proceeding] through the mechanism contemplated of the contract market or a registered futures association should be encouraged to be resolved in such manner.* H.R. Rep. No. 93-975, 93rd Cong., 2d Sess. 22 (1974) (emphasis added).

Elsewhere in the Committee's report the reparations procedure is described as one "under which [the CFTC] will handle customers' complaints arising from violations of the Act, particularly those which result in financial loss to the customers. The Commission will consider *all* such complaints which have not been resolved through the settlement procedures required of exchanges." *H.R. Rep. No. 93-975,* 93d Cong., 2d Sess. 83 (1974) (View of the Department of Agriculture, as reported to House Committee on Agriculture) (emphasis added). It is apparent from the Committee's own statement, the statement of the Department of Agriculture which is apparently endorsed by the Committee, and the complete absence of any reference by the Committee to a civil action in the federal courts, that no private civil action for damages was contemplated.

The legislative history of the 1978 Amendments indicates that Congress, in 1978, still viewed the statutorily prescribed remedies as the only private remedies created by Congress for violation of the CEA. The Senate Report on the 1978 Amendments twice lists the means by which "customers are afforded protection" by the CEA. Private civil actions filed in the courts are conspicuous by their absence from each list. S. Rep. No. 95-850, 95th Cong., 2d. Sess. 12-13, 32 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 2087-2166, 2101, 2120.

Since Congress has clearly defined the mode of the Long Traders' remedy against Clayton, it would be improper to impute to Congress the intent to create another mode of remedy. *National Railroad Passenger Corp.* v. *National Railroad Passenger Ass'n,* 414 U.S. at 458, *citing Botany Worsted Mills* v. *United States,* 278 U.S. 282, 289 (1929).

V.

There Is No Credible Basis Upon Which To Conclude That Congress Intended To Create Private Rights Of Action In 1974

A. Congress made no atempt to ratify the private rights of action previously implied by courts under the CEA

The Court of Appeals disregarded all of the foregoing indicia that Congress never intended to create private rights of action for violations of Sections 4a, 4b or 9(b). Adopting the arguments of the Respondents and several district courts, the Court of Appeals opined that Congress intended to preserve the private rights of action which had been recognized by the decisions of a few lower federal courts when it enacted the CFTC Act.[31] The "preservation" theory proceeds from the premise that the Ninety-Third Congress was aware of the decision in *Goodman* v. *H. Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967), and a series of decisions which relied on that case. On that premise, the advocates of the "preservation" theory point to a sentence in Section 201(B) of the CFTC Act, preserving the jurisdiction of state and federal courts, as evidence that Congress intended to preserve the private rights of action recognized in the *Goodman* line of cases. To buttress this argument, the preservationists invoke the familiar canon of statutory construction that the reenactment of a statute incorporates existing constructions of the statute.

This theory ignores the rule clearly enunciated by this Court that affirmative Congressional intent to create the private right of action asserted must be found. *See* discussion *supra*, at 8-11. The preservationists find no specific Congressional intent to create a private right of action evident in the statute or in the

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[31] *Leist* v. *Simplot*, 638 F.2d 283, 322, JA 170. *See also Jones* v. *B. C. Christopher & Co.*, 466 F.Supp. 213, 219 (D. Kan. 1979); *Hofmayer* v. *Dean Witter & Co.*, 459 F.Supp. 733, 737 (N.D. Cal. 1978).

legislative history of the provisions of the CEA at issue in this case. The basis articulated by the Court of Appeals for implying a private right of action was Congress' supposed ratification of lower court decisions recognizing a private right of action for violation of the CEA, which decisions cannot stand the test of the rigorous analyses which must now be applied.[32] The Court of Appeals urged that the climate of the times in an "expansion era"[33] warranted imputing to Congress an intent to create a private right of action. The Court of Appeals failed to recognize that the critical period to which attention must be directed in this case is 1936, the time of the enactment of the statute. Thus, whatever the merit of this test applied to a statute enacted in an "expansion era," the method of analysis wholly fails in this case. Moreover, neither the language nor the legislative history of Section 201(B) of the CFTC Act supports the preservationists' theory, and even a superficial examination of the CFTC Act demonstrates that the "re-enactment" principle is simply inapplicable.

1. Section 201(b) of the CFTC Act simply preserves the ability to enforce state and federal law not otherwise pre-empted by the CEA.

Section 201(b) of the CFTC Act expanded the definition of the term "commodity" as defined in the CEA and defined the jurisdiction of the CFTC. It provides, in pertinent part:

> Sec. 201. Section 2(a) of the Commodity Exchange Act, as amended (7 U.S.C. §§2, 4), is amended -
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> . . .
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> (b) By striking the period at the end of the third sentence of the section and substituting therefor the following: ". . . *Provided,* That the Commission shall have exclusive jurisdiction with respect to accounts, agreements . . . and

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[32] The "one differentiating fact of transcendent importance" was the existence of these decisions. 638 F.2d at 303, JA 127.

[33] 638 F.2d at 296-99, JA 113-20.

> transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 5 of this Act or any other board of trade, exchange, or market, . . . *And provided further,* That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State. Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade. Pub. L. No. 93-463, §201, 88 Stat. 1395 (1974) (emphasis added).

The proponents of the preservation theory rely on the underscored language of this section as an indication that Congress intended to preserve the private right of action recognized in the *Goodman* case. The language will not support the burden sought to be placed on it.

The language in question does not deal with the creation or abrogation of substantive rights, it merely deals with the subject matter jurisdiction of courts to enforce such substantive rights as have been otherwise created and preserved. By its terms, the language of Section 201(b) relied on to support the preservation theory does no more than assure that the vesting of exclusive jurisdiction in the CFTC which is accomplished by Section 201(b) does not deprive state or federal courts of the subject

matter jurisdiction otherwise conferred on them. Evaluation of the statutory scheme of the CEA demonstrates that this was essential since the areas of law pre-empted by the CEA's occupation of the field are not correlative with the "exclusive jurisdiction" which would have been conferred on the CFTC but for the qualifying language in Section 201(b).

The CEA establishes a pervasive system of regulating the manner in which trading in commodity futures contracts is conducted. Either the CEA itself or the regulations promulgated by the CFTC pursuant to its authority conferred by the CEA regulates virtually every aspect of a transaction in commodity futures from the disclosure an FCM is required to make to a prospective cutomer before the customer can trade commodity futures contracts through the FCM, *see* 17 C.F.R. §1.55 (1980), through the manner in which a customer's order is handled by the FCM and the floorbroker, *see* 7 U.S.C. §§6b, 6c; 17 C.F.R. §§155, 166 (1980), to the manner in which the customer's funds must be handled and the transaction confirmed to the customer. *See* 7 U.S.C. §6b. The CEA, however, does not establish a body of substantive law which governs the rights acquired by the parties to a commodity futures contract pursuant to the terms of that contract.[14] Consequently, the CEA does not occupy the field in this area of law and state laws, such as the U.C.C., which govern such contract rights, are not pre-empted and remain applicable to commodity futures contracts.

Section 2 of the CEA, as amended by the CFTC Act, 7 U.S.C. §2, confers exclusive jurisdiction on the CFTC over all transactions involving commodity futures contracts. The CEA does not, however, establish any means by which the CFTC may

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[14] Section 5a of the CEA, 7 U.S.C. §7a, does require that contract markets include certain terms in the futures contracts traded on the exchange floor. These provisions do not, however, provide a means of determining compliance with the terms of a traded contract, nor specify all of the contract's terms. They only specify certain terms which must be included in the contract.

adjudicate any claims except those based upon a violation of the CEA or any rule, regulation or order thereunder. *See* 7 U.S.C. §18. Assuming, then, that a dispute arose between the parties to a futures contract concerning the performance required under the terms of that contract, the CFTC would not have any means of adjudicating the dispute.

The language of Section 2 of the CEA which qualifies the grant of exclusive jurisdiction of the CFTC by expressly preserving the jurisdiction of the courts assures the availability of a forum in which such disputes based on state law may be adjudicated. Without such a forum, the provisions of commodity futures contracts would be, as a practical matter, unenforceable.

The legislative history of the qualifying language on which the "preservation" theory is based confirms that the critical language was inserted in Section 201(b) of the CFTC Act to preserve the availability of a forum. Section 201 of the CFTC Act originated in H.R. 13113. After the House of Representatives adopted H.R. 13113, it was realized that Section 201(b) of H.R. 13113 might raise serious questions of ousting state courts of their jurisdiction over contractual claims arising under commodity futures contracts, elimination of the jurisdiction of federal courts over antitrust claims arising in conection with the commodity futures industry, and preclusion of judicial review of administrative proceedings. The Hon. Peter W. Rodino, Jr., Chairman of the House Committee on the Judiciary, discussed these problems during his testimony before the Senate Committee on Agriculture and Forestry. During the testimony, he proposed that Section 201(b) be amended by the Senate by adding qualifying language substantially identical to that now included in Section 2 of the CEA.[11] No concern that this provision might

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[11] Chairman Rodino's explanation of the problem and proposal to solve the problem was made as follows:

eliminate private rights of action under the Act was even suggested, and there was certainly no indication that the additional

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One of the bills before this Committee during these hearings is H.R. 13113 "Commodity Futures Trading Commission Act of 1974" that passed the House on April 11, 1974 . . .

Section 201(B) of H.R. 13113 provides in relevant part,

"*Provided.* That the Commission shall have exclusive jurisdiction of transactions dealing in, resulting in, or relating to contracts of sale of a commodity for future delivery, traded or executed on a domestic board of trade or contract market or on any other board of trade, exchange, or market; *And provided further,* That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities under the laws of the United States or restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with the laws of the United States."

This double proviso could be construed to raise a question of federal pre-emption of the commodity futures industry and, therefore, unnecessarily raises a question of federal-State relationships. Many of the millions of commodity futures contracts are presently enforceable in State courts under recognized commercial law and contract principles. This double proviso could, in effect, deprive State courts of their current jurisdiction. There does not appear to be any legislative intention or established need to achieve this pre-emption. . . .

In addition, this double proviso could possibly be read as an attempt to oust even federal courts of jurisdiction. The first proviso confers "exclusive jurisdiction" on the Commission for commodity transactions. Exceptions to this exclusive jurisdiction are carved out in the second proviso without, however, referring to federal district courts. That such a result was not intended in the House is readily apparent from the House action striking the original antitrust exempting provison: antitrust laws are to apply to commodity transactions and, of course, federal courts play an instrumental role in promoting as well as protecting the national policies expressed already in the antitrust laws. Arguably, too, if jurisdiction of federal courts were to be withdrawn also, Commission decisions on commodity transactions would be non-reviewable by the judiciary raising, thereby, serious questions of administrative and constitutional law.

language proposed by Chairman Rodino would somehow preserve a right of action based on the CEA, as distinguished from the preservation of a court's jurisdiction.

It would be astonishing if Chairman Rodino, who was responsible for proposing the language relied on by the preservationists, or any other member of Congress imagined they were in some manner acting to preserve a substantive statutory right supposed to have been conferred by the CEA by acting to preserve the subject matter jurisdiction of the state and federal courts established by constitutional and statutory provisions not part of the CEA. As this Court reiterated in *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 577, a jurisdictional provision "creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the [statute] which they seek to enforce, not in the jurisdictional provision."

Indeed, it is clear that Congress did not intend the sentence in question to have any impact on the substantive provisions of the CEA contained in other sections of the statute. The sentence begins "Nothing in *this section* . . . ." By contrast, the very next sentence of Section 201(B) begins "Nothing in *this Act* . . . ."

> . . . If it appears advisable to retain rather than to delete the double proviso of Section 201(B) of H.R. 13113, it would seem reasonable to amend the second proviso appropriately to define the jurisdiction, including antitrust jurisdiction, of federal courts for commodity transactions. In this regard, the second proviso could be amended to provide:
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> "*And provided further,* That nothing herein contained shall supersede or limit the jurisdiction at any time conferred on the Securities Exchange Commission or other regulatory authorities *and on federal court* . . . ."

Commodity Futures Trading Commission Act: Hearings Before The Senate Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837, and H.R. 13113, 93d Cong., 2d Sess. (pt. 1) 259-60 (1974) (statement of Hon. Peter W. Rodino, Jr.) (emphasis added).

Had Congress intended the sentence relied on to affect the impact or construction of other provisions of the CEA, particularly those on which the decision in the *Goodman* case and its progeny were based, it surely would not have utilized such confining language.

2. The CFTC Act did not re-enact any provision of the CEA

The proponents of the "preservation" theory also argue, without any support from the text of the CFTC Act or its legislative history, that it must be presumed that Congress intended to preserve the right of action recognized in *Goodman* because it did not expressly repudiate that decision. The rationale for this conclusion is supposedly provided by the familiar canon of statutory construction, recited in *Van Vranken* v. *Helvering*, 115 F.2d 709, 710 (2d Cir.), *cert. denied*, 313 U.S. 585 (1940), that the re-enactment of a statute is presumed to incorporate prior judicial interpretations. This argument is wholly without merit.

Congress did not re-enact any provision of the CEA when it enacted the CFTC Act.[36] Although one proposed version of the CFTC Act, S. 2485, would have repealed the CEA as it existed in 1974 and enacted an entirely new statute which would have included provisions substantially identical to Sections 4a, 4b and 9(b),[37] Congress did not follow this approach. Rather, it amended the CEA. Congress' affirmative action in amending Sections 4a, 4b and 9(b) in 1974 did not alter the nature of the conduct proscribed by those sections or the manner in which such conduct was proscribed.[38] Since the Ninety-Third Congress

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[36] In 1922, Congress did enact the Grain Futures Act, portions of which had been included in a predecessor statute, the Futures Trading Act, a statute ruled unconstitutional by this Court in *Hill* v. *Wallace*, 259 U.S. 44 (1922).

[37] *See Commodity Futures Trading Commission Act: Hearings before the Committee on Agriculture and Forestry on S. 2485, S. 2578, S. 2837 and H.R. 13113*, 93rd Cong., 2d Sess. 2, 9, 12, 48 (1974).

[38] *See* discussion *supra*, at 19.

did not put its imprimatur on the language of Sections 4a, 4b and 9(b) by re-enacting that language, there is simply no basis for application of the canon relied on by the Majority in the court below.[39]

Had Congress in fact re-enacted Sections 4a, 4b and 9(b) of the CEA, the canon of construction relied on would not be sufficient to support the decision of the Court of Appeals in this case. In *Van Vranken*, 115 F.2d at 711, the court, speaking through Judge Learned Hand, refused to apply the canon to the circumstances there present, emphasizing that:

> The canon which the taxpayer invokes is sometimes a help, but we must never ignore the more important, though impalpable, factors. Indeed, nothing is so likely to lead us astray as an abject reliance upon canons of any sort; so much the whole history of verbal interpretations teaches, if it teaches anything.

The canon must not prevent the courts from correcting erroneous doctrine. As this Court stated in *Helvering* v. *Hallock*, 309 U.S. 106, 119-21 (1940):

> Nor does want of specific congressional repudiations of the *St. Louis Union Trust Co.* cases serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the *Klein* case, make for dissonance of doctrine. It would require very persuasive circumstances enveloping congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of non-action by Congress when Congress itself sheds no light is to

[39] Even if the Ninety-Third Congress had re-enacted Sections 4a, 4b and 9(b) of the CEA, the evidence is overwhelming that Congress did not intend private rights of action like that asserted by the Long Traders to be available. *See* discussions *supra*, at 19-23, 26-27, 30-34, and *Leist* v. *Simplot*, 638 F.2d at 323-24, JA 174-177 (Mansfield, J., dissenting).

> venture into speculative unrealities . . . . *Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction . . . of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle. (emphasis added).*

Accord, Girouard v. *United States,* 328 U.S. 61, 69-70 (1946). As discussed below, *infra,* at 45-47, the pre-CFTC Act decisions of the courts which recognized private rights of action based on conduct violative of the CEA were erroneously decided. Congress cannot be presumed by its silence to have intended to approve and adopt incorrect decisions of lower federal courts. It is apparent, therefore, that the Majority below and those other courts which rely on the ratification rationale erroneously invoked that canon of statutory interpretation.

B. It is unnecessary to find that the CFTC Act repealed the private rights of action previously implied from the CEA

The Majority in the Court of Appeals held that the resolution of the question before this Court depends upon whether Congress, by enacting the CFTC Act, repealed the private rights of action previously implied from the Commodity Exchange Act by certain federal courts. *Leist* v. *Simplot,* 638 F.2d 283, 303, JA 126-28. *See also Alken* v. *Lerner,* 485 F.Supp. 871, 977 (D. N.J. 1980). This argument is tantamount to holding that once a private right of action has been implied from a federal regulatory statute by a few federal courts,[40] it exists as a

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[40] Prior to the enactment of the CFTC Act, several reported cases recognized, in one respect or another, that a private right of action might be implied from the Act. *Seligson* v. *New York Product Exch.,* 378 F.Supp. 1076 (S.D.N.Y. 1974); *Arnold* v. *Bache & Co.,* 377 F. Supp. 61 (M.D. Pa. 1973); *Johnson* v. *Arthur Espey, Shearson, Hammil & Co.,* 341 F.Supp. 764 (S.D.N.Y.1972); *McCurnin* v. *Kohlmeyer & Co.,* 340 F.Supp. 1338 (E.D.La. 1972); *Anderson* v. *Francis I. du-*

statutory right which can only be retracted by Congress and not by this Court.

This argument, however, is hopelessly flawed because its premise is erroneous. Notwithstanding the decisions of several courts which recognized or gave effect to purported private rights of action based on the CEA, no such right of action has ever, in fact, existed.

Pont & Co., 291 F.Supp. 705 (D.Minn. 1968); *Goodman* v. *H. Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967). In *Seligson*, the court paid lip service to the proposition that a private right of action was an available remedy for violations of the Act, but then ruled that it was unavailable to the plaintiff. In *McCurnin*, the court initially recognized the possibility that a private right of action under the Act would be available to the plaintiff. That plaintiff's claim under the Act, however, was subsequently rejected by the court. *McCurnin* v. *Kohlmeyer & Co.*, 347 F.Supp. 573 (E.D. La. 1972), *aff'd*, 477 F.2d 113 (5th Cir. 1973).

Only three circuit Courts of Appeal even arguably addressed this issue prior to the enactment of the CFTC Act. *Deaktor* v. *L. D. Schrieber & Co.*, 479 F.2d 529 (7th Cir.1973); *McCurnin* v. *Kohlmeyer & Co.*, 477 F.2d 113 (5th Cir.1973); *Booth* v. *Peavey Company Commodity Servs.*, 430 F.2d 132 (8th Cir. 1970). *Deaktor* was reversed on other grounds on appeal to the Supreme Court. *Chicago Mercantile Exch.* v. *Deaktor*, 414 U.S. 113 (1973). The Supreme Court, on review, did not address the issue of whether the private right of action under the Act asserted by the plaintiff was, in fact, available. The Court of Appeals' decision in *McCurnin* affirmed a decision dismissing the plaintiff's claims under the Act. The Court declined to elaborate on the reasons for its decision. In *Booth*, the court raised the issue of the existence of a private right of action under the Act on its own initiative and apparently decided the issue without the benefit of arguments from counsel, based on the precedent of the erroneously decided *Goodman* case.

Of the utmost importance is the fact that this Court never directly addressed the issue before 1974. In what appears to be the only case to date in which the issue could have been decided by this Court, the Court directed that the case should have been "routed in the first instance to the Commodity Exchange Commission" (a predecessor to the CFTC). *Chicago Mercantile Exch.* v. *Deaktor*, 414 U.S. at 115.

From 1936 until 1974 the basic substance of the CEA remained unchanged. For the first thirty-one years of this period, its provisions were enforced solely by the means prescribed by the statute. In 1967, the District Court for the Northern District of Illinois was presented with what it perceived to be a novel argument: that a private right of action existed based upon the CEA. The court came to the equally novel conclusion that a private right of action to recover damages stemming from conduct violative of the CEA was available based on federal law "even in the absence of specific mention of a civil remedy in the Commodity Exchange Act." *Goodman* v. *H. Hentz & Co.*, 265 F.Supp. at 447. The *Goodman* court made no determination that Congress intended to establish a private remedy for violation of the CEA. Instead, it found that the violation of the CEA was actionable under the principle set forth in *Restatement of Torts* §286. *Id.* The *Goodman* court's decision was based upon clearly erroneous reasoning. A federal statutory cause of action cannot be implied on the basis of tort principles. *Touche Ross & Co.* v. *Redington*, 442 U.S. at 568. For this reason, and because it is unquestionably the law that private rights of action cannot be implied in the absence of a demonstrated affirmative intent by Congress, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, the *Goodman* court's decision is simply wrong.

After the decision in *Goodman* was published, a few other courts announced decisions which upheld plaintiffs' contentions that a private right of action was available to remedy violations of the CEA. These decisions either relied uncritically on the precedent of the *Goodman* case or followed the same rationale. *See, e.g., Booth* v. *Peavey Company Commodity Services*, 430 F.2d 132, 133 (8th Cir. 1970); *Arnold* v. *Bache & Co.*, 377 F.Supp. 61, 65 (M.D. Pa. 1973); *Anderson* v. *Francis I. duPont & Co.*, 291 F.Supp. 705, 710 (D. Minn. 1968). But none of these courts, nor any other court, expressed the opinion that Congress affirmatively intended to create a private right of action for violation of the CEA. Indeed, as the *Goodman* court

conceded, no such intent could be discerned from the statute or the legislative history. *Goodman* v. *H. Hentz & Co.*, 265 F.Supp. at 447.

Most importantly, the pre-1974 decisions which implied the existence of private rights of action under the CEA did not *create* any private right of action. As a matter of constitutional law, they could not, since the creation of statutory rights of action is a power vested exclusively with the legislature. *See* discussion *supra*, at 8-11. Rather than creating private rights of action for violation of the CEA, the repeated enforcement of these non-existent rights only perpetuated an unconstitutional and, therefore, invalid usurpation of legislative authority by the courts. The unconstitutionality of the course pursued is clear and its abandonment is compelled. *See Cannon* v. *University of Chicago*, 441 U.S. at 742 (Powell, J., dissenting); *Erie Railroad* v. *Tompkins*, 304 U.S. 64, 77-78 (1938).

The Majority below nevertheless determined that because the purported right of action was recognized by the courts prior to the enactment of the CFTC Act and was not expressly repealed therein, courts should recognize its existence. This conclusion, however, is premised upon the existence of the right of action in the first instance. To avoid repeal, there must necessarily be something to be repealed. But the right of action here asserted is not founded on any express provision in the CEA. Thus, there was no statutory language creating the right of action (by implication or otherwise) which might have been repealed to eliminate the fictitious right of action. The failure to repeal a non-existent right of action by failing to retract non-existent statutory language can hardly be an appropriate basis for subsequently implying the existence of a right of action.

CONCLUSION

For the foregoing reasons, Petitioner Clayton Brokerage Co. of St. Louis, Inc. respectfully requests that this Court vacate the Judgment of the Court of Appeals and reinstate the Judgment of the District Court.

Respectfully submitted,

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